

FEDERAL PUBLIC DEFENDER

DISTRICT OF NEW JERSEY

RICHARD COUGHLIN
FEDERAL PUBLIC DEFENDER

800-840 Cooper Street
Suite 350
Camden, New Jersey 08102

CHESTER M. KELLER
FIRST ASSISTANT

(856) 757-5341 Telephone
(856) 757-5273 Facsimile

August 26, 2021

Honorable Robert B. Kugler
Senior United States District Judge
Mitchell H. Cohen Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101

Re: *United States v. Moises Hernandez*,
Crim. No. 06-736 (RBK)
Motion to Stay

Dear Judge Kugler:

Currently pending before this Court is Mr. Hernandez's motion for a sentence reduction under Section 404 of the First Step Act. On November 2, 2020, the government filed a response in opposition to Mr. Hernandez's motion, arguing that relief was foreclosed by *United States v. Birt*, 966 F.3d 257, 265 (3d Cir. 2020) (holding that a conviction 21 U.S.C. § 841(b)(1)(C) is not a "covered offense" under the First Step Act because the statutory range of 0 to 20 years does not change as a result of the Fair Sentencing Act). On November 4, 2020, Mr. Hernandez filed a request for a stay in this matter pending the outcome of a petition for certiorari in *Birt v. United States*, Docket No. 20-291.

On June 14, 2021, the United States Supreme Court issued a decision in *Terry v. United States*, 141 S.Ct. 1858, 1864 (2021), holding that the Fair Sentencing Act did not modify statutory penalties for 21 U.S.C. § 841(b)(1)(C) offenses and, therefore, defendants convicted of an § 841(b)(1)(C) offense were not eligible for a sentence reduction under Section 404 of the First Step Act. In light of the *Terry* decision, the petition for certiorari in *Birt* was denied on June 21, 2021.

Mr. Hernandez was convicted of an offense under § 841(b)(1)(C). The decisions in *Terry* and *Birt* thus foreclose relief in Mr. Hernandez's case. The stay should be lifted so the Court can resolve Mr. Hernandez's motion in light of these recent decisions.

Sincerely,

s/ Julie A. McGrain

Julie A. McGrain
Assistant Federal Public Defender

cc: Jason M. Richardson, AUSA (via ECF)
Moises Hernandez